



## ***Beyond Church And State: School Vouchers And The Blaine Amendment***

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Like clockwork, the question of school vouchers makes a prominent appearance whenever the media focus on a statewide election in New York, particularly one in a heavily Orthodox district. The latest chime was sounded during the battle between Lew Fidler and David Storobin to fill an open state senate seat; both promised constituents that they would make the fight for vouchers and tax education credits their priority. (Nearly a month after the election, a winner has still not been declared in the election.)

Jewish groups have been pushing this issue forward for years, hoping that vouchers will help ease the strain of tuition for Jewish families, who often have multiple children attending yeshiva day schools. They have been joined by Catholic groups and non-parochial organizations that favor “parental choice” – the buzzword for increased educational options for children.

But do vouchers have a legal leg to stand on in New York, or are all these campaign promises and advocacy efforts just a lot of talk?

The Blaine Amendment, which prohibits the use of state funds to aid religious schools, appears to be the main constitutional barrier. Drafted in the 1870s by an anti-Catholic U.S. senator, the amendment was intended to punish Catholics who wanted to pull out of the common schools, which at that time were predominantly Protestant-led, according to Eric Rassbach, deputy general counsel for the Becket Fund for Religious Liberty, which has worked with the Orthodox Union on the issue of vouchers.

The Blaine Amendment failed to get the requisite amount of votes to become a federal amendment, but was eventually adopted by nearly all 50 states, including New York, and fiercely restricts the amount and type of aid that states can provide to private schools.

But Maury Litwack, director of political affairs for the Orthodox Union, said the Blaine Amendment is not the real issue preventing school vouchers in New York.

Litwack and many other experts contend that it is less of a legal question than a political one, with the strong presence of the powerful teachers' and public employee unions crowding out the possibility of advancing issues against their agenda.

“It’s a boogie-man issue in general – bring up vouchers and you get into state vs. church discussions when it should be much broader than that,” said Litwack. “The biggest problem is that [the Blaine Amendment] is used as a reason by legislature, more of a symbol by states to say ‘we can’t help you.’ It’s more of a public blockade than an actual constitutional problem.”

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Richard Komer, a senior attorney at the Institute for Justice (IJ), a libertarian public interest law firm, agrees: Political challenges in New York are harder than other states because unions *are* stronger here, he said.

Komer noted that New York is the home base for the American Federation for Teachers, one of the two major teachers' unions in America. Public employee unions are very powerful as well in the state and have a lot of sway in the Democratic Party, he said.

“That’s why you don’t have [vouchers]” he said, “It’s not that anyone has argued against it,” but legislators are aware of the political challenges.

Komer said that Governor Andrew Cuomo made some quiet inquiries as to the constitutionality of vouchers in New York during his campaign, to which IJ responded that vouchers are constitutional in New York State.

Those that point to the political challenges in New York say that state courts have been quite liberal in interpreting the Blaine Amendment, especially in contrast to other states.

For example, non-public school students in New York receive aid in the form of school transportation, textbooks, and more recently get \$330 in state aid under the Empire tax credit, Litwack pointed out. (Public school students receive this stipend as well.)

In contrast, states like Florida and Washington don't provide funding for transportation. In Florida, where the Blaine Amendment has been interpreted very strictly by the courts, it's been put on the ballot for repeal, he said.

"As long as a school voucher program includes making a genuine independent choice by the parents – in which they are making the decisions where the money is getting directed – it should be constitutional," said Rassbach at the Becket Fund.

Komer echoed that sentiment. "It's clear who the direct beneficiaries are – it's the families who pay for this. Any benefits to the school are incidental," and therefore constitutional, he said.

There are some, though, that do see the Blaine Amendment as a significant legal barrier.



Eric Rassbach of the Becket Fund for Religious Liberty: "As long as a school voucher program includes making a genuine independent choice by the parents... it should be constitutional."

"This law, born of anti-religious sentiment, severely limits the educational options available for families," said Councilman David G. Greenfield (D-Brooklyn) in an e-mail.

Greenfield is the founder of Teach NYS (The Educational Alliance for Children in *New York State*), a coalition of groups that advocates for the needs of non-public school students.

The current executive director of Teach NYS, Shai Franklin, said, “We don’t push for vouchers; in terms of our own calculations, it would send up a red flag.”

Some legal experts say that New York effectively paved the way for the legality of a voucher program in a 1968 ruling, where they found that the state could provide textbooks to non-public school children, calling the aid “incidental,” according to IJ’s Forman.

Andrew Coulson, director of the Center for Educational Freedom at the CATO Institute, disagrees. “There are a couple of reasons to be unsure on that,” he said. “One point is that textbooks are a fairly minor contribution to operation expenses, and the court decision said that since benefit was minimal, it didn’t constitute an establishment of religion, and therefore didn’t really tackle the Blaine Amendment.

He said that courts have a fair bit of latitude and they have interpreted the Blaine Amendment in different ways, but on paper the amendment does seem to preclude vouchers.

And “because of the doubt that is going to hang over any voucher program, and it will definitely be sued by the public school employee union the moment it passes, tying up the issue in court for some time,” school choice groups in New York are advocating for more realistic, passable actions, he said.

Because of these potential challenges, the OU and other groups have chosen to focus their efforts on other forms of aid, according to Nathan Diament, executive director for public policy at the OU.

“We’re working on getting aid for schools in their security needs, more services for special-ed, getting schools more supplementary assistance, CAP funding – funding for auxiliary services from administrative services to serving kids in need,” he said.

Both Litwack and Franklin pointed to the many strides that New York has made with helping non-public school students, including transportation, special-ed and remedial education through Title 1.

Several years ago, when Eliot Spitzer was attorney general in New York State, he convened a committee made up of education advocates, experts and religious leaders to discuss ways to support the education of non-public students without touching on the hot-button issues of vouchers and credits.

Of the four specific recommendations that were introduced, two were enacted, according to Avi Schick, a partner in the New York office of SNR Denton who was working for

Spitzer at the time. New York State now provides funding for purchasing and loaning computer hardware to students in non-public schools, he said. In addition, he said that the special education recommendation, which clarified that students who receive state-funded special-ed services may receive those services at the non-public schools that they attend, was signed into law.

Franklin said his coalition is working hard on scholarship tax credits, which would give a generous tax credit limited to the first 200 million in donations to public and non-public schools.

There are some hefty financial benefits for providing tax credits for donations to religious schools, he said, citing statistics that when a state-funded charter school opens up within the vicinity of a Catholic school, half of the students enrolling in that charter school are from the Catholic school, representing a new financial burden for the state of \$14-15,000 per child.

“If you can throw some tax credit money to kids in Catholic schools, encouraging more to enroll, the state has saved a ton of money,” he said.

William Rapfogel, executive director at the Metropolitan Council on Jewish Poverty, agrees. “I have long believed that there should be a way for government to reimburse the families who send their children to non-public schools,” he said in an e-mail. “Were those schools to fail and close, the burden of the children’s secular education would fall to the government. Perhaps dollar for dollar commitment is not the solution, but if government reimbursed parents via a tax credit that is worth, say, two-thirds of the cost of educating their child in a public school – thereby saving taxpayers one third – it would be a reasonable compromise.”

Jewish groups generally don’t make that argument because yeshiva students are less likely to transfer to a secular school, Franklin said, but “in essence, we’re doing the state’s job...[and giving tax breaks] should be in the state’s interest – that the money could be used for other financial stimuli; [otherwise,] people don’t take vacations, enclose their porch, buy a second car...”

Coulson of the Cato Institute said that scholarship donation tax credits, which give businesses or individuals the option of donating money to nonprofits and having those nonprofits subsidize tuition for low-income families, currently exist in several states and are a good option to pursue in New York.

“Participation in those programs is voluntary,” he said. “The key is that no one is forced to participate and the taxpayer has free choice where to donate their funds, so you don’t run into the Blaine Amendment barrier.”

Franklin said that Teach NYS is making scholarship tax credits their priority this year. “The teachers’ unions are going to be so thrilled about it, because it means also advancing non-public schools,” he said, but he hopes that their fight against Tier 6, a

proposed new pension plan that includes reductions in benefits and increases in employee contributions, will keep them busy.

“Non-public schools get less than 1% [of state education funding] and we educate 15% of kids in the state,” he said. “You don’t have to pay us dollar for dollar, but the state should do something to recognize that we’re saving them money; we’re paying taxes and not using most of the tax money.”